
To: E.A. Sween Company (sbaird@winthrop.com)
Subject: TRADEMARK APPLICATION NO. 77042491 - CHUCKWAGON - 11419
Sent: 4/20/2008 1:34:56 PM
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Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/042491

MARK: CHUCKWAGON

CORRESPONDENT ADDRESS:

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MINNEAPOLIS, MN 55402-4629

GENERAL TRADEMARK INFORMATION:
<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: E.A. Sween
Company

**CORRESPONDENT'S
REFERENCE/DOCKET NO:**
11419

CORRESPONDENT E-MAIL ADDRESS:
sbaird@winthrop.com

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE: 4/20/2008

Applicant is requesting reconsideration of a final refusal issued/mailed March 7, 2008.

After careful consideration of the law and facts of the case, the examining attorney must deny the request for reconsideration and adhere to the final action as written since no new facts or reasons have been presented that are significant and compelling with regard to the point at issue.

Accordingly, applicant's request for reconsideration is *denied*. The time for appeal runs from the date the final action was issued/mailed. 37 C.F.R. Section 2.64(b); TMEP Section 715.03(c). If applicant has already filed a timely notice of appeal, the application will be forwarded to the Trademark Trial and Appeal Board (TTAB).

Applicant argues that there is no actual confusion. Applicant is reminded that the absence of actual confusion is not dispositive. The test under Trademark Act Section 2(d) is whether there is a *likelihood of confusion*. It is unnecessary to show actual confusion in establishing likelihood of confusion. TMEP §1207.01(d)(ii); e.g., *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990). The Trademark Trial and Appeal Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984).

Please note that applicant's argument about concurrent use and actual confusion are misplaced in this forum as this is an ex-parte proceeding. As an ex-parte proceeding, the Registrant is not provided an opportunity to defend these claims. Trademark Act Section 7(b), 15 U.S.C. §1057(b), provides that a certificate of registration on the Principal Register is prima facie evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce on or in connection with the goods and/or services specified in the certificate. During ex parte prosecution, the trademark examining attorney has no authority to review or to decide on matters that constitute a collateral attack on the cited registration. TMEP §1207.01(d)(iv).

If applicant has questions about its application or needs assistance in responding to this Office action, please telephone the assigned trademark examining attorney directly at the number below.

/Nakia D. Henry/
Trademark Attorney (Law Office 111)
United States Patent and Trademark Office
Phone: (571) 272-7208
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STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

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IMPORTANT NOTICE
USPTO OFFICE ACTION HAS ISSUED ON 4/20/2008 FOR
APPLICATION SERIAL NO. 77042491

Please follow the instructions below to continue the prosecution of your application:

VIEW OFFICE ACTION: Click on this link http://tmportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=77042491&doc_type=REC&mail_date=20080420 (or copy and paste this URL into the address field of your browser), or visit <http://tmportal.uspto.gov/external/portal/tow> and enter the application serial number to access the Office action.

PLEASE NOTE: The Office action may not be immediately available but will be viewable within 24 hours of this notification.

RESPONSE MAY BE REQUIRED: You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable **response time period**. Your response deadline will be calculated from 4/20/2008.

Do NOT hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.

HELP: For *technical* assistance in accessing the Office action, please e-mail TDR@uspto.gov. Please contact the assigned examining attorney with questions about the Office action.

WARNING

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in the ABANDONMENT of your application.**